STATE OF MICHIGAN

IN THE SUPREME COURT

FRANK MONAT,

Plaintiff-Appellee,

vs.

STATE FARM INSURANCE COMPANY,

Defendant-Appellant.
_____/

SUPREME COURT NO. 121122
COA DOCKET NO. 222690
CIRCUIT COURT NO.98-816391-CK

JEFFREY HOLLANDER (P49306)
Attorney for Plaintiff-Appellee
620 North Pontiac Trail
Walled Lake, MI 48390
(248) 669-7151

RICHARD E. MOBLO (P32921)
Attorney for Defendant-Appellant
39555 Orchard Hill Place, Suite 545
Novi, MI 48375
(248) 305-9900

_____/

BRIEF ON APPEAL - DEFENDANT-APPELLANT

ORAL ARGUMENT REQUESTED

MOBLO & FLEMING, P.C.

BY: _____

RICHARD E. MOBLO (P32921)
CHERYL L. RONK (P54897)
Attorneys for Defendant-Appellant
39555 Orchard Hill Place, Suite 545
Novi, MI 48375-5397
(248) 305-9900
rmoblo@mobloflemming.com

Dated: May 16, 2003

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

TABLE OF CONTENTS

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

INDEX OF AUTHORITIES

MICHIGAN CASE LAW

FEDERAL CASE LAW

MICHIGAN STATUTES

MICHIGAN COURT RULES

OTHER AUTHORITY

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

STATEMENT OF QUESTION INVOLVED

I. IS PLAINTIFF-APPELLEE'S CLAIM FOR PERSONAL PROTECTION INSURANCE BENEFITS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL WHEN A JURY IN PLAINTIFF'S THIRD PARTY ACTION CONCLUDED PLAINTIFF DID NOT SUFFER AN INJURY AS A RESULT OF THE ACCIDENT?

The trial court answers "NO."

Defendant-Appellant answers "YES."

Plaintiff-Appellee answers "NO."

The Court of Appeals answers "NO."

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

STATEMENT OF FACTS

This is a first-party no-fault benefits case arising out of a very minor rear-end accident that occurred on March 26, 1997 in the city of Dearborn. Plaintiff-Appellee Frank Monat was the driver of a 1987 Chevrolet Cavalier. Mr. Monat was stopped at a traffic light when he was struck from the rear by another vehicle driven by Loni Mrozek. There was very minor, if any, damage to Plaintiff-Appellee's vehicle.

As a result of this accident, Plaintiff-Appellee complained of a myriad of problems, such as dizziness, difficulty hearing, balance problems, and bulging discs resulting in nerve impingement in both his upper and lower back. As such, Plaintiff-Appellee filed an automobile negligence action against the driver of the negligent vehicle. Shortly thereafter, Plaintiff-Appellee's PIP benefits were cut-off by State Farm on May 31, 1998. Accordingly, Plaintiff-Appellee then filed the present action against State Farm for personal injury protection benefits claiming that it failed to pay wage loss, medical expenses and household services. Both cases were pending before Judge Michael Callahan in the Wayne County Circuit Court. However, neither case was consolidated for any purpose.

Plaintiff-Appellee proceeded to trial in his third-party case entitled *Frank Monat v. Loni Marie Mrozek and Gerald A. Mrozek, Case No. 97-734872-NI*. Prior to the trial, counsel for Plaintiff and Defendant entered into an agreement where both parties gave up their right to appeal the matter in lieu of a settlement cap. Defendants received a no cause of action against Plaintiff-Appellee with the jury returning a verdict finding **he had no injury** from the March 1997 accident. See **Appendix A**, Verdict Form.

Pursuant to Plaintiff-Appellee's first party action against State Farm, he is seeking no-fault benefits for injuries he allegedly received as a result of the same March 26, 1997 accident.

However, this was the ultimate issue of fact in Plaintiff-Appellee's third-party case. In that matter, it has been decided that Plaintiff-Appellee was **NOT** injured as a result of the accident. As such, the issue cannot be re-litigated in Plaintiff-Appellee's PIP case.

Accordingly, Defendant-Appellant filed a motion for summary disposition pursuant to MCR 2.116(C)(7) arguing that Plaintiff-Appellee's claim for PIP benefits was barred by the doctrine of collateral estoppel. Essentially, Defendant-Appellant State Farm argued that the jury in Plaintiff-Appellee's auto negligence claim determined that Plaintiff-Appellee did not suffer an injury arising out the accident. This determination was indicated in the jury's Verdict Form. See **Appendix A**, Verdict Form.

Defendant-Appellant's motion was heard before Judge Michael Callahan in Wayne County Circuit Court on August 13, 1999. See **Appendix B**, Transcript. Judge Callahan denied this motion. An order was entered denying this motion on September 20, 1999. See **Appendix C**, Order Denying Defendant's Motion for Summary Disposition.

Defendant-Appellant then timely filed an interlocutory appeal to the Michigan Court of Appeals. On February 15, 2002, the Court of Appeals affirmed the trial court in a per curiam opinion. See **Appendix D**, Court of Appeals Opinion.

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

ARGUMENT

I. PLAINTIFF'S CLAIM FOR PERSONAL INJURY PROTECTION BENEFITS IS BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL WHEN A JURY IN PLAINTIFF'S THIRD PARTY ACTION CONCLUDED PLAINTIFF DID NOT SUFFER AN INJURY AS A RESULT OF THE ACCIDENT

Defendant-Appellant is entitled to summary disposition of all claims for personal injury protection benefits (PIP) based on collateral estoppel due to a jury in a third party action, arising out of the same accident, finding that the Plaintiff-Appellee suffered no injury as a result of the accident. Consequently, the trial court's Order denying Defendant-Appellant summary disposition should be overturned.

Appellate review of a motion for summary disposition is de novo. Spiek v Michigan Dept. of Transportation, 456 Mich 331; 572 NW2d 201, 204 (1998).

The doctrine of collateral estoppel is known as issue preclusion. That is, collateral estoppel applies, "where the first and second causes of action are different, 'the judgment [rendered in the first cause of action] is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment.'" Alterman v. Provizer, 195 Mich App 422, 424 (1992) (quoting Howell v. Vito's Trucking Co., 386 Mich 37, 42 (1971)). For the doctrine to apply, the same ultimate issues underlying the first action must be involved in the second action. The parties must also have had a full and fair opportunity to litigate that ultimate issue in the previous action. See Latimer v. William Mueller & Son, Inc.,149 Mich App 620 (1986). In addition, there must be mutuality of the parties. However, the Michigan Supreme Court, as well as other jurisdictions, acknowledged that collateral estoppel applies even when there is a lack of mutuality. See Howell, 386 Mich at 46-47, n. 7; Lichon v. American Universal Ins. Co., 435 Mich 408, 428, n. 16.

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

The Courts of this state, other states, and the Supreme Court of the United States, have opined that collateral estoppel, even in the absence of mutuality of parties, is appropriately utilized in a defensive manner. An important distinction exists between the "offensive" and "defensive" use of collateral estoppel. Non-mutual "defensive" collateral estoppel occurs when a defendant in the action seeks to prevent plaintiff from asserting a claim plaintiff had previously litigated and lost. This is because, the estoppel is being used as a "shield," and the plaintiff has already had his day in court on the issue. **Almost every court allows this type of collateral estoppel because it is logical and fair.** (See generally 47 Am Jur 2nd Section 645-648 (1995)); 31 ALR 3rd 1045.

The converse of defensive estoppel, or a "shield," is a plaintiff's utilization of estoppel, frequently known as "offensive estoppel," or a "sword." Offensive estoppel occurs when plaintiff seeks to preclude a defendant from litigating an issue which defendant had previously litigated unsuccessfully in an action involving another party. Offensive estoppel has been viewed as more problematic than the defensive use of collateral estoppel. However, at issue in the instant case, is only the use of defensive collateral estoppel.

Michigan courts have allowed a lack of mutuality in cases involving the ***defensive*** use of collateral estoppel. See Knoblauch v. Kenyon, 163 Mich App 712, 720-21 (1987); Schlumm v. Terrance J. O'Hagan, P.C., 173 Mich App 345, 357 (1988); Braxton v. Litchalk, 55 Mich App 708 (1974); Alterman v. Provizer, 195 Mich App 422, 424 (1992). The court of appeals in Knoblauch adopted the use of non-mutual defensive collateral estoppel, despite the absence of any binding Michigan precedent. The court in Knoblauch looked to Braxton v Litchalk 55 Mich App 708 (1974) with approval. In Braxton, the court noted with approval the opinions of other states, and held that in determining whether or not collateral estoppel should apply where there is no mutuality, two factors must be considered: (1) whether the collateral estoppel is being used

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

offensively or defensively; and (2) whether the party against whom the doctrine is being asserted against **had an opportunity to litigate the issue in the prior proceeding**. Braxton at 722-723. **The Braxton court permitted defensive collateral estoppel when the above test was satisfied.** In fact, the court in Knoblauch specifically stated:

> Clearly, the trial court in this case was of the opinion that the **identity of the issues should override the fact that the parties were not the same as the parties in the underlying case**. In these days of congested dockets, **we find too little satisfaction in strict adherence to the mutuality requirement, where, as here, the issue presented has been decided and appealed and the plaintiff has had a full and fair opportunity to litigate the question in his prior case.** This collective dissatisfaction is compounded by the fact that **the legal underpinnings of Howell have been largely eroded in the last decade.** The mutuality requirement set forth in the Restatement (First) and cited in Howell has been dropped in Restatement Judgments (Second), Secs. 27-29, pp 119-123.

Knoblauch, 163 Mich App at 720-21 (emphasis added).

Further, the court in Alterman agreed with the court's decision in Knoblauch and, in particular relied on footnote 16 in Lichon. All three cases have held that the doctrine of collateral estoppel may be invoked under certain circumstances where there is a lack of mutuality of parties from a prior action. The Alterman court noted, "the Supreme Court noted in Lichon that '[t]he Court of Appeals has recognized that [in addition to the well-established exceptions listed above] there may be other situations in which the mutuality requirement is relaxed.'" Alterman, 195 Mich App at 425. The case at bar presents one of those situations contemplated by the Michigan Supreme Court.

In fact, the Supreme Court of the United States accepted the compelling logic of the waiver of the requirement of mutuality with defensive assertions of collateral estoppel. In Blonder-Tongue Labs, Inc. v University of Illinois, 402 US 313 (1971), the Supreme Court indicated:

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

> Many State and Federal Courts rejected the mutuality requirement, especially where the prior judgment was invoked defensively in a second action against the plaintiff bringing suit on an issue he litigated and lost by the plaintiff in a prior action . . .

Blonder-Tongue Labs, Inc., 402 US at 324.

In addition, the Michigan Supreme Court's decision in Howell is not instructive in this matter and is clearly distinguishable from the case at bar. In Howell, the plaintiff attempted to use the doctrine offensively, not defensively. Moreover, the issues involved in the two cases were clearly not related. That is, in the first action, plaintiff was suing defendant for ***HER*** injuries resulting from an auto accident. In the second action, plaintiff brought suit against defendant under the wrongful death statute as an heir. Howell, 386 Mich at 44.

In this case, plaintiff claims he is entitled to PIP benefits as a result of an automobile accident that occurred on March 26, 1997. As such, he claims he suffered bodily injury arising out of the operation, use, or maintenance of a motor vehicle as a motor vehicle. See MCLA 500.3105(1); SJI2d 67.01 *as amended*. See **Appendix E**. Defendant does not contest the "arising out of," "ownership, operation, use, or maintenance," or "use of a motor vehicle as a motor vehicle" portions of this claim. Defendant does contest, however, the bodily injury portion of plaintiff's claim.

The applicable section of the No-Fault Act provides in pertinent part as follows: "Under personal protection insurance an insurer is liable to pay benefits for **accidental bodily injury** arising out of the ownership, operation, maintenance, or useful motor vehicle as a motor vehicle, subject to the provisions of this chapter." MCLA 500.3105(1). While the payment of no-fault first-party benefits are due regardless of fault, it is without question that in order for any benefits to be due and owing, there must be a finding of **accidental bodily injury**.

In first party litigation, this question is posed by the standard jury instructions. SJI2d 67.01

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

mandates that the jury make a determination as to the following: "Did the plaintiff's injuries arise out of the (ownership/or/operation/or/maintenance/or use) of the motor vehicle as a motor vehicle?" Succinctly stated, before plaintiff may pursue any first party benefits in the context of a first party action, he must establish an injury.

In the third party action brought by plaintiff against the admitted tortfeasor, a question was posed to the jury as to whether the plaintiff had sustained injury. Specifically, the jury was asked to determine: **"Was the plaintiff injured?"** In response to this question the jury unequivocally found in the negative. **(Appendix A)**.

Indeed, Plaintiff-Appellee already fully litigated whether he sustained a bodily injury from the March, 1997 accident in his third-party case entitled, *Frank Monat v. Loni Marie Mrozek and Gerald A. Mrozek, Case No. 97-734872-NI*, in Wayne County Circuit Court. After hearing the evidence, the jury determined that Plaintiff-Appellee did not suffer any injury resulting from this accident. **(Appendix A)**.

In the case at bar and to recover PIP benefits, the Plaintiff-Appellee must establish he was injured as a result of this accident. This was the ultimate issue of fact brought before the jury in Plaintiff-Appellee's previous action. In the case at bar, the jury will be asked a similar question: whether Plaintiff-Appellee sustained an accidental bodily injury from this accident. The verdict in the previous third-party case finding that Plaintiff-Appellee was not injured in the accident made a determinative finding that he did not sustain an injury arising out of the operation of a motor vehicle. As such, Plaintiff-Appellee has already had a full and fair opportunity to litigate the issue of whether he was injured as a result of this accident. To allow Plaintiff-Appellee to re-litigate this issue would allow him to have a second bite at the apple after the issue has been previously decided by a jury.

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

It should be noted that prior to Michigan's adoption of the No-Fault Act, a plaintiff bringing a claim for damages arising from an automobile accident would necessarily have had mutuality of the parties. This is true because, there was no statutory division of first and third party claims or economic and non-economic damages. A plaintiff would simply bring an action against the third party tortfeasor for all losses. As such, the mutuality only became an issue as plaintiff is now required to institute separate actions against the alleged tortfeasor as well as his own insurer.

This division creates two separate causes of action by operation of non-mutuality. The adoption of the No-Fault Act, however, should not create the absurd result which Plaintiff-Appellee seeks herein. That is, Plaintiff-Appellee after having proceeded to trial, submitted proofs, and having had every opportunity to convince a jury that he sustained an injury from the motor vehicle accident of March 26, 1997 in the context of his third party action and having failed in this endeavor, should not now be permitted to seek economic damages for these same claimed injuries. **Simply stated, a jury having determined the Plaintiff-Appellee was not injured in the motor vehicle accident serves to bar Plaintiff-Appellee's claim for economic and/or non-economic damages either brought in separate first- or third-party actions or in a consolidated fashion.**

In the present actions, it remains clear that Plaintiff-Appellee has had ample opportunity to litigate the issue as to whether he sustained an injury in the car accident. The fact of an injury is a pre-requisite to recovery under both the first party and third-party no-fault system of recovery. Whether Plaintiff-Appellee entered into an agreement in the prior action should have absolutely no bearing on the present matter. Quite simply, if the agreement would have effect, every plaintiff attorney who handled both a first- and third-party case, as in this instance, would request such an agreement to insulate themselves from a no-cause verdict. Further, this would create a windfall for plaintiff's attorneys who handle both claims. That is, they would have an opportunity to try the

same case twice.

A jury having determined that the Plaintiff-Appellee did not sustain any injury in his motor vehicle accident of March 26, 1997 renders further proceedings in the remaining first party action moot. Plaintiff-Appellee has had his day in court, had every opportunity and incentive to persuade a jury that he sustained an injury in the accident, and failed in this regard. A jury having determined Plaintiff-Appellee was not injured, Plaintiff-Appellee has no cause of action against Defendant-Appellant State Farm for first party benefits alleged to be due and owing.

The efficient administration of justice alone should preclude Plaintiff-Appellee from re-litigating this issue.

The Court of Appeals, in affirming the trial court's denial of Defendant-Appellant's motion for summary disposition, reasoned:

> The doctrine of mutuality of estoppel requires that, in order for a party to estop an adversary from re-litigating an issue, that party must also have been a party, or privy to a party, in the previous action . . . Mutuality of estoppel remains the law in this state, with limited exceptions not applicable here.
>
> Defendant has cited no cases that extend the relaxation of the mutuality requirement into the insurance context and raises no persuasive argument to do so. Where the Supreme Court has affirmed the continuing vitality of the mutuality requirement, there is no basis for reversing the trial court's decision here."

See **Appendix D**.

However, Judge Wilder, writing in dissent, opined:

> In Lichon v American Universal Uns Co., 435 Mich 408, 428 n16; 459 MW2d 288 (1999), our Supreme Court noted that "[t]he Court of Appeals has recognized that there may be other situations [beyond those involving well-established exceptions] in which the mutuality requirement is relaxed."... The facts presented in the instant case constitute another situation to which the rule relaxing the mutuality requirement should be extended. Accordingly, I would reverse the trial court and 'hold that plaintiff is collaterally estopped from re-litigating the issue, even though the parties are not identical, no mutuality exists, and no traditional exceptions apply."

See **Appendix D**.

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

While the majority in the Court of Appeals felt compelled to affirm the trial court's Order due to the lack of any case that specifically addressed the issue of estoppel under the facts of this case, clearly Judge Wilder, in writing for the dissent, more accurately set forth the law established in Lichon, supra regarding estoppel, law which establishes that estoppel would be appropriate in cases without mutuality of parties if justice so required.

While the existing case law supports Defendant-Appellant's position, even if it did not, clearly this Honorable Court should extend estoppel to first party actions where a jury in a third party has found no injury.

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900

RELIEF REQUESTED

Defendant-Appellant respectfully requests this Honorable Court to reverse the trial court's denial of Defendant-Appellant's motion for summary disposition and the Court of Appeals' affirmation of same and dismiss Plaintiff-Appellee's claims with prejudice.

MOBLO & FLEMING, P.C.

BY: Richard E. Moblo

RICHARD E. MOBLO (P32921)
CHERYL L. RONK (P54897)
Attorneys for Defendant-Appellant
39555 Orchard Hill Place, Suite 545
Novi, MI 48375-5397
(248) 305-9900

Dated: May 14, 2003
W:\1085\Brief on Appeal - Supreme Court.wpd

MOBLO & FLEMING, P.C. • 39555 ORCHARD HILL PLACE • SUITE 545 • NOVI, MICHIGAN 48375-5397 • (248) 305-9900